No. 21097

In the

United States Court of Appeals For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

BRIEF OF CROSS-APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

J. DENNIS FAUCHER
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JURISDICTION

Jurisdiction is based on diversity of citizenship and the fact that the amount in controversy is in excess of $10,000.00. Cross-appellant is a national banking association with its principal place of business in Boise, Idaho. Cross-appellee is a corporation organized and existing under the laws of the State of Washington with its principal place of business in that state and

is licensed to do an insurance business in the State of Idaho. There matters are admitted in the Pre-Trial Order (Tr. Vol. I, p. 32).

The basis of jurisdiction of the United States District Court to hear this cause is based upon 28 U.S.C. Sec. 1332. The jurisdiction of this court to review is based upon 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

Cross-appellant brought this action in the United States District Court to recover for two losses which it had suffered during the course of banking operations. The District Court ruled adversely to cross-appellant on Counts II and III of the complaint and in cross-appellant's favor on Count I. Only one transaction is involved in this cross-appeal, although two counts of the complaint, Count II and Count III, are involved. This cross-appeal followed judgment being entered on Counts II and III in favor of cross-appellee.

To a great extent cross-appellant is in agreement with the Amended Findings of Fact by the trial court. Since these have not been contested by cross-appellee, they can be used to show most of the factual situation. These Findings include the following (Tr. Vol. I, pp. 51-59):

1. Cross-appellee issued to cross-appellant its Bankers Blanket Bond, Form No. 24, and this bond remained in full force and effect at all times pertinent here;

2. On February 10, 1964, a woman giving her name as Clara Perkins deposited with cross-appellant at its Lewiston, Idaho, branch a check which purported to be a cashier's check drawn on and issued by the First National Bank of San Angelo, Texas;

3. The purported cashier's check was not a form of cashier's check used by that bank, and was instead a counter check which had been changed in appearance to make it appear to be a cashier's check;

4. The name which appeared to be that of an authorized signatory, James C. Bolton, was not the name of any person who had ever been an officer or employee of the First National Bank of San Angelo, Texas;

5. On account of the transaction cross-appellant suffered a loss in the amount of $2,987.35.

There are other pertinent facts. The Bankers Blanket Bond (Pl. Ex. 4) covered not only loss through a counterfeit instrument or signature, insuring clause (E), but also loss through false pretenses, insuring clause (B).

When the woman first made herself known in the branch bank in the early part of February of 1964, she opened a checking account with a small deposit and represented that her husband had been transferred from Boise to Lewiston as an agent with the Internal Revenue Service (Tr. Vol. III, p. 31). At that time she gave the bank a local address (Tr. Vol. III, p. 32). Between that first encounter and the cashing of the purported cashier's check a week or more elapsed. During that period of time she went into the bank twice — once to return the signature cards and once to cash a check (Tr. Vol. III, p. 32). At the time she presented the purported cashier's check (Pl. Ex. 1), she represented that the check constituted proceeds from the sale of a house that had belonged to her deceased father in Texas (Tr. Vol. III, p. 34). She asked for and received $3,000 in cash, stating that she needed

that amount to apply on the purchase of a home (Tr. Vol. III, p. 34).

The bank later discovered that the Internal Revenue Service had no agent by the name the woman gave as that of her husband and that, while she had rented an apartment at the address given, she had not established residence there (Tr. Vol. III, pp. 34, 35). The check was not honored, as the Amended Findings of Fact show.

SPECIFICATIONS OF ERROR

Cross-appellant contends the court erred in the following:

1. In not finding in it favor on Count II of the Complaint.

2. In not finding in its favor on Count III of the Complaint.

3. In not entering Judgment in its favor and against cross-appellee on Count II of the Complaint.

4. In not entering Judgment in its favor and against cross-appellee on Count III of the Complaint.

5. In making and entering that portion of its Finding of Fact Number V under the heading Counts II and III which reads as follows: ". . . and was in fact a forgery."

6. In making and entering its Conclusion of Law Number II under the heading Counts II and III.

7. In not making and entering under the heading Counts II and III its finding of fact that the loss was caused by false pretenses.

8. In not making and entering under the heading Counts II and III its finding of fact that the loss was caused by counterfeiting or conterfeit instrument.

9. In not making and entering a conclusion of law that it is entitled to judgment against cross-appellant under Count II and/or III for the sum of $2,987.35 plus reasonable attorney fees and costs, and for interest on said sums from and after the date of judgment at the rate of 6% per annum.

SUMMARY OF ARGUMENT

The loss sustained was covered by two separate insuring clauses of the Bankers Blanket Bond. It was a loss through the insured's having given value upon a written instrument which was counterfeited, and it was a loss through false pretenses.

While a loss through false pretenses is excluded if it is effected by means of forgery, the exclusion is inapplicable because forgery was not present. In regard to the loss being based on a counterfeit instrument, there is no general exclusion for forgery, but there is an exclusion contained within the applicable insuring clause. This limited exclusion does not apply to the factual situation present here.

ARGUMENT

I. *The Bond and Applicable Law — In General*

To a great extent this cross-appeal calls for the construction of the insurance policy involved — the Bankers Blanket Bond, Form No. 24. Only a few provisions are applicable, and these are insuring clauses (B) and (E), and exclusion 1(a). These provisions are as follows:

(B) Any loss of Property through robbery, burglary, commonlaw or statutory larceny, theft, false pretenses, hold-up, misplacement, mysterious unexplainable disappearance, damage thereto or destruction thereof, whether effected with or without violence or with or without negligence on the part of any of the Employees, and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except in an office hereinafter excluded or in the mail or with a carrier for hire, other than an armored motor vehicle company, for the purpose of transportation.

Any loss, through any hazard specified in the preceeding paragraph, of any of the items of property enumerated in the paragraph defining Property, while within any of the Insured's offices covered hereunder and in the possession of any customer of the Insured or of any representative of such customer, whether or not the Insured is legally liable for the loss thereof, excluding, however, loss caused by such customer or any representative of such customer.

(E) Any loss through the Insured's having, in good faith and in the course of business, whether for its own account or for the account of others, in any representative, fiduciary, agency or any other capacity, either gratuitously or otherwise, purchased or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon any securities, documents or other

written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any person signing in any other capacity, or raised or otherwise altered or lost or stolen, or through the Insured's having, in good faith and in the course of business, guaranteed in writing or witnessed any signatures, whether for valuable consideration or not and whether or not such guaranteeing or witnessing is ultra vires the Insured, upon any transfers, assignments, bills of sale, powers of attorney, guarantees, endorsements or other documents upon or in connection with any securities, obligations or other written instruments and which pass or purport to pass title to such securities, obligations or other written instruments; EXCLUDING, HOWEVER, any loss through FORGERY OR ALTERATIONS of, on or in any checks drafts, acceptances, withdrawl orders or receipts for the withdrawal of funds or Property, certificates of deposit, letters of credit, warrants, money orders or orders upon public treasuries; and excluding, further, any loss specified in subdivisions (1) and (2) of Insuring Clause (D) as printed in this bond, whether or not any amount of insurance is applicable under this bond to Insuring Clause (D).

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

Section 1. This Bond Does Not Cover:

(a) Any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause (A), (D), (E), (F) or (G).

It will be noticed that exclusion 1(a) does exclude loss effected through false pretenses, insuring clause (B), when it is effected by means of forgery, unless the loss is covered by one of the other insuring clauses there enumerated.

It will also be noticed that if the loss is covered by insuring clause (E), the exclusion 1(a) is, by its own terms, inapplicable. Insuring clause (E) does have its own exclusionary provision.

Since this action is based on an insuring instrument, it might be well to consider several rules of construction relative to such contracts. They may be set out as follows:

Ambiguities are to be construed against the insurer and in favor of the insured.

Indemnity Insurance Co. v. Pioneer Valley Savings Bank, 343 F2d 634 (8th Cir. 1965);

Hawkeye Casualty Co. v. Western Underwriter's Ass'n., 53 F.Supp. 256 (D.C. Idaho, 1944);

Mayflower Insurance Exchange v. Kosteriva, 367 P2d 572, 84 Idaho 25 (1961);

Scharbach v. Continental Casualty Company, 366 P2d 826, 83 Idaho 589 (1961).

Where a term in an insurance policy is susceptible of two constructions, the one most favorable to the insured will be adopted.

Nichols & Thompson Core Drill Co. v. Homeland Ins. Co., 148 F.Supp. 260 (D.C. Idaho 1957);

Scharbach v. Continental Casualty Co., supra; *Penrose v. Commercial Travelers Insurance Company*, 275 P2d 969, 75 Idaho 524, (1954);

O'Neil v. New York Life Ins. Co., 152 P2d 707, 65 Idaho 722 (1944).

Where a clause in an insurance policy is susceptible of more than one construction, that construction most favorable to the insured will be adopted, and the policy will be construed in view of its general objects and conditions rather than with a strict and technical interpretation.

Penrose v. Commercial Travelers Insurance Company, supra; *O'Neil v. New York Life Ins. Co., supra*;
Rollefson v. Lutheran Brotherhood, 132 P2d 758, 64 Idaho 331 (1942).

In New York courts have twice held that the rule of construing ambiguities and clauses susceptible of more than one meaning against the insurer applies to bankers blanket bonds.

Kean v. Maryland Casualty Co., 223 NYS 373 (1927), affirmed 162 N.E. 514;
De Lanoy, Kipp & Swan v. New Amsterdam Casualty Co., 11 NYS2d 625 (1939).

II. *The Loss Was Caused by a Counterfeit Instrument and Is Not Excluded.*

Assuming that the loss is covered by insuring clause (E), the general exclusion 1(a) is not applicable. The wording of 1(a) is to the effect that forgery is not covered unless the loss is covered by insuring clause (E) or one of the other clauses there inumerated. Insuring clause (E) covers loss caused by the insured having "purchased or otherwise acquired . . . or given any value . . . upon . . . written instruments which prove to have been counterfeited . . ." The specific

manner in which this clause is to be interpreted was considered by the Court in *Fidelity Trust Co. v. American Surety Co. of New York*, 268 F2d 805 (3rd Cir. 1959). The court held that "forged" and "counterfeited" do not mean the same thing.

"Argument for the surety companies urges the point that the word 'or' between the word 'counterfeited' and the word 'forged' indicates the use of different terms to express the same thing. That means, necessarily, that the word 'counterfeited' could just as well be left out for it adds nothing to the term 'forged.'

"We do not think this is the best construction of the instrument. The form was offered as a contract by large professional surety companies who certainly know what they are doing. We cannot think that it has not been very carefully drafted or that the draftsman put in words to mean nothing. Furthermore, this language is that of the promisor who is doing professional business for a consideration. The bond contained in the record is a printed form submitted by the surety company. If there is doubt about the meaning of language under those circumstances, it is not to be resolved in favor of the one who chose the words and as a business transaction issued the bond to another. Its very term 'Blanket Bond' indicates that its coverage is to be wide and it is not unfair to interpret the document in this fashion.

"The plaintiff's argument provides us with an ingenious diagram to show the type of loss which, under its construction, the bond protects against. It argues as follows:

'Plaintiff is protected against loss from its having acted upon "written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any presons signing in any other capacity,

or raised

or otherwise altered

or lost

or stolen * * *" '

"We think that this is a more apt reading of the language than that shown in the argument of the defendant." 268 F2d at 807.

Three elements must be present before the loss comes within the clause as it was interpreted by the Court of Appeals — (1) the bank must have acted; (2) there must have been a written instrument; (3) the instrument must have been counterfeited. There can be no question but what the first two are present. The check (Pl. Ex. 1) is certainly a written instrument, and the bank certainly acted upon it when it was taken as a cash item. Whether or not the instrument was a counterfeit can best be considered in connection with the question of whether or not it was a forgery.

Even though the general exclusion for forgery does not apply, there is an exclusion within insuring clause (E). Excluded is any loss ". . . through FORGERY . . . of, on or in any checks . . ." Throughout the proceedings it has been the contention of the insurance company that the instrument was a forgery rather than a counterfeit instrument. The trial court held it to be a forgery.

That there is a distinction between the two was clearly stated by the Eight Circuit Court of Appeals in *Fidelity Trust Co. v. American Surety Co. of New York, supra.* If a counterfeit instrument is to be considered a forgery, then insuring clause (E) does not insure against any loss whatsoever. Logic dictates that a complex insuring clause is not inserted into a policy merely to exercise the minds of judges and lawyers.

It thus becomes a matter of choosing definitions of the two words and applying these to the facts. Obviously the definitions that should be considered are those prescribed by the courts in construing the exact clause present here and in construing similar clauses.

In *State Bank of Poplar Bluff v. Maryland Casualty Co.*, 289 F2d 544 (8th Cir. 1961) the court was called upon to define the terms. While the problem concerned chattel mortgages listing non-existent automobiles, the applicable clause was (E) of a Bankers Blanket Bond No. 24.

> "General definitions tell us that 'forgery' means the 'act of forging, fabricating, or producing falsely', that the noun 'counterfeit' means 'that which is made in imitation of something with a view to deceive', and that the verb 'counterfeit' means 'to imitate'. Webster's New International Dictionary (Second Edition, 1960). The legal definitions place like emphasis, so far as forgery is concerned, upon copying or imitating. Black's Law Dictionary (Fourth Edition, 1961); 23 Am.Jur., Forgery, Sec. 2; 37 C.J.S. Forgery Sec. 1; 14 Am.Jur., Counterfeiting, Sec. 2; 20 C.J.S. Counterfeiting Sec. 1. All this implies to us falsification and lack of genuineness in the instrument itself rather than in its content." 289 F2d at 547, 548.

In *Detroit v. Standard Accident Ins. Co.*, 222 N.W. 134, 245 Mich. 14 (1928), the insured sought to recover under a provision insuring against loss caused by forged indorsements. The facts disclosed that a valid check payable to a corporation had been indorsed in the name of the corporation "By J. P. Lynch." Lynch deposited the money to his own account and later withdrew it. The court held there has been no "forgery" if a person signs his own name pretending to represent one whom he does not in fact represent. Likewise in another bankers bond case, *Tiarks v. First National Bank of Mobile*, 182 So2d 366, ___ Ala. ___ (1966), the court held it is not forgery for one to sign his own name.

Applying the facts present here to the last cited cases, there is no forgery present. There is no evidence in the record indicating that the name which appeared on the instrument (James C. Bolton) was not in fact the name of the person who affixed that signature. Likewise there is no evidence indicating that the woman who indorsed was not in fact Clara Perkins. The burden was on the insurer to prove the signatures were not genuine — to prove that the loss was excluded. *O'Neil v. New York Life Ins. Co., supra*

Now using the definition of the two terms approved by the Eighth Circuit Court of Appeals in *State Bank of Poplar Bluff v. Maryland Casualty Co., supra*, the instrument is counterfeit, but is not a forgery. When additional typing or printing was put on the counter check so as to make it appear to be a cashier's check, this was making "in imitation of something with a view to deceive." It was the act of "copying or imitating." Since the signatures must be assumed to be genuine, there was "falsification and lack of genuine-

ness in the instrument itself rather than in its content."

Further support for cross-appellant's contentions is found in two cases which define "counterfeit" as used in insuring clause (E) to mean an imitation which simulates another document or writing.

> *Exchange National Bank of Orleans v. Insurance Co. of North America*, 341 F2d 673 (2nd Cir. 1965);
>
> *First National Bank & Trust Co. of Oklahoma City v. United States Fidelity & Guaranty Co.*, 347 F2d 945 (10th Cir. 1965).

III. *The Loss Was Caused By False Pretenses and Is Not Excluded.*

Several instances of false pretense are present in this case. The uncontroverted testimony of a bank employee, Gary Asker, clearly shows that the loss was caused by a scheme which was intended to lull the bank so that the check could be passed. All of the actions of the woman amounted to one gigantic false pretense. In addition there are specific instances of false pretenses. The woman falsely represented that her husband was an Internal Revenue agent who had recently been transferred to Lewiston; she represented that she had taken up residence at a specific address in Lewiston; and she represented that the check constituted the proceeds of the sale of her deceased father's house. Perhaps an even more glaring false pretense was the presenting of the check. The presenting itself was a representation that the instrument was valid.

Rather than explore the law relative to false pretenses, cross-appellant refers the court to the discussion and citation of authority in its brief submitted in the initial appeal arising from this action. The briefs of the appellant (cross-appellee herein) also concern themselves with the question of what constitutes false pretenses.

Once the presence of false pretenses is established, the burden of proving that an exclusion in the policy precludes recovery rests with the insurance company. *O'Neil v. New York Life Ins. Co., supra.* Since no evidence was presented by the insurance company (cross-appellee) at the trial of this action, the judgment in favor of the insurance company can only be based on the check itself (Pl. Ex. 1) and the wording of the bond (Pl. Ex. 4).

Since exclusion 1(a) excludes loss effected directly or indirectly by means of forgery, the only question is whether the loss was caused by forgery.

Once again the question presented is whether or not forgery was present. If the loss was effected by means of forgery, recovery is precluded by exclusion 1(a).

Nothing can be added to the previous discussion in this regard. What has already been said in support of the proposition that the instrument was not a forgery is applicable here.

CONCLUSION

Cross-appellant respectfully requests that the court reverse the judgment of the trial court and enter

judgment in its favor on any of the grounds argued in this brief.

Respectfully submitted,

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W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN

By .....
Attorneys for Cross-Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Dennis Faucher, Attorney

ACKNOWLEDGMENT OF SERVICE

The undersigned, attorneys of record for cross-appellee herein, hereby acknowledges receipt of three copies of the foregoing brief this day of , 1966.

CLEMONS, SKILES & GREEN

By .....
Attorneys for Cross-Appellee

APPENDIX OF EXHIBITS

Exhibit	Identified	Offered	Admitted or Rejected
Plaintiff's 1		Pre - Trial Order	
Plaintiff's 4		Pre - Trial Order	
Plaintiff's 5		Pre - Trial Order	
Defendant's 10	Vol. III, p. 38	Vol. III, p. 39	Vol. III, p. 39
Defendant's 11	Vol. III, p. 38	Vol. III, p. 39	Vol. III, p. 39
Defendant's 12	Vol. III, p. 42	Vol. III, p. 42	Vol. III, p. 48
Defendant's 13	Vol. III, p. 48	Vol. III, p. 48	Vol. III, p. 48
Defendant's 14	Vol. III, p. 48	Vol. III, p. 48	Vol. III, p. 48
Defendant's 15	Vol. III, p. 48	Vol. III, p. 48	Vol. III, p. 48
Plaintiff's 16	Vol. III, p. 47	Vol. III, p. 47	Vol. III, p. 48
Plaintiff's 17	Vol. III, p. 48	Vol. III, p. 48	Minute Entry, Nov 23, 1965 (Tr Vol. I, p. 78)